IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1579

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,
Petitioners

v.

PEPI, INC., PHILIPS ELECTRONICS INSTRUMENTS INC. and NORTH AMERICAN PHILIPS CORPORATION,
Respondents

Respondents' Brief In Opposition To Petition For Certiorari

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED*

The Questions Presented in the Petition for Writ of Certiorari are inappropriate. Question one is simply impertinent. Question two is not "expressed in the terms and circumstances of the case" as is required by Rule 23(c) Supreme Court Rules. It would appear from the argument

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* Respondents herein have filed a Petition for Writ of Certiorari at No. 75-1518. The questions presented in that petition are separate from the questions raised by petitioners herein.

advanced for granting the writ that petitioners intended to raise three separate issues under question two. These issues would appear to be:

1. Whether an individual who is the president and principal shareholder of a corporate dealer organization has standing to sue where it is alleged that anticompetitive restraints imposed on the corporate dealer caused another corporation (also owned and managed by the individual plaintiff) to pay a lower salary to the individual plaintiff?

2. Whether the court below followed appropriate standards of appellate review in a private antitrust case where it reviewed the record and concluded that plaintiff had failed to introduce sufficient evidence to establish; (a) any injury resulting from alleged price fixing, (b) any injury from alleged exclusive dealing, and (c) a violation of §3 of the Clayton Act?

3. Whether the court below failed to follow appropriate standards for appellate review when it remanded part of the case for retrial on the issue of damages?

STATEMENT OF THE CASE

The Statement of the Case in the petition contains a correct summary of certain events prior to the trial and sets forth accurate quotations from the verdict slip from the jury and from the order entered by the Court of Appeals. In part 2 of the Reasons for Granting the Writ, the petitioners have also made numerous assertions of fact. Many of these assertions, however, are inaccurate, incomplete or misleading. Accordingly, some additional statement is required to clarify several of the more serious of these errors in the petition.

On the issue of price fixing petitioners asserted that they had presented "clear and uncontroverted evidence at trial that dealers paid artificially inflated prices for PEI

products." (Petition p. 15) Petitioners then summarized their position by stating:

> "Given the admitted technical comparability of competitive products with PEI products, and given the difference in price, the holding that the fact of damage has not been proved requires of petitioners a standard of proof far beyond what this Court has held proper." (Petition p. 16)

The facts, however, are to the contrary. The portions of the record cited by the petitioners demonstrate merely that in some of its product lines, the respondents made and sold scientific instruments like the electron microscope which were more expensive than those made by other manufacturers. Indeed, respondents' electron microscope was referred to as the "Cadillac" of the industry. (R. 1632a) There was no citation to the record to support the statement as to the "technical comparability of competitive products with PEI products." Indeed, the record would show that technical differences existed between the various manufacturers' equipment. Finally, the references to price differences are totally misleading. All of the dealers who sold respondents' products purchased equipment at the same price as the petitioners. The references to the record all cite differences in prices with respect to equipment sold by other manufacturers. Such differences between various manufacturers' product lines are the same differentials which one encounters between different makes of automobiles. (R. 605a-606a) Thus there is absolutely no evidence that the respondents imposed inflated prices on the petitioners.

Petitioners have played fast and loose with the record and even with the opinion of the court below throughout their petition. Another example of this can be found in petitioners' presentation with respect to the issue of

exclusionary dealing. Petitioners asserted with respect to the opinion of the court below on this issue that:

> "Rather than presuming the continuation of the illegal activity, the Court of Appeals assumes its termination in the face of evidence to the contrary." (Petition p. 17)

This is not an accurate reading of the opinion of the Court of Appeals. The Court did not assume that a policy of exclusive dealing "terminated," rather the Court of Appeals found that the evidence of injury was insufficient. In fact, the Court of Appeals relied specifically on the testimony of Mr. Pitchford (R. 983a) that he could not cite any examples of sales which were lost because of the alleged exclusive dealing practices. (Opinion 14a)

It is important to keep in mind the fact that the principal issue raised in the appeal to the United States Court of Appeals for the Third Circuit was a lack of proof of the necessary elements for recovery in a private treble damage action. As a result, the attention of the Court of Appeals was directed to the entire record. Extensive briefs were filed by both parties, lengthy oral argument was permitted, and supplementary memoranda were solicited from counsel. All of the arguments concerning the record and the inferences which might be drawn from the record contained in the petition for certiorari were reviewed previously by the Court of Appeals.

THERE ARE NO REASONS FOR GRANTING THE WRIT

The first reason advanced for granting the writ is impertinent and does not require a response. While the characterizations of prior opinions from the United States Court of Appeals for the Third Circuit are often grossly incorrect, a rebuttal might lend undeserved dignity to an

improper argument.* Suffice it to say that the office of the writ of certiorari is to grant review of a decision which raises matters of great importance and not to review earlier decisions of the same court of appeals.

The approach which petitioners have taken in part 2 of the Reasons for Granting the Writ is fundamentally unsound. The facts and the cases have been distorted in an effort to create an impression that some real issues may exist warranting appellate review. Some of the distortions are patently obvious while others require a more detailed review of the opinion of the Court of Appeals.

It is obvious that Mr. Pitchford does not have standing to sue for alleged lost salary from a corporation (Pitchford Manufacturing) which allegedly was impeded from introducing a new product by reason of restraints imposed upon the plaintiff dealer organization (Pitchford Scientific Instruments Corporation).**

Likewise, petitioners' reliance on *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and

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* Petitioners view that the Court of Appeals "has effectively destroyed the private action as a tool for the enforcement of the antitrust laws" (Petition p. 9) is apparently not shared by others. 109 private antitrust actions were filed in 1974 in district courts within the Third Circuit. Only the Second, Fifth and Ninth Circuits had more private antitrust actions filed in that year. *Annual Report of the Director of the Administrative Office of the United States Courts (1974)*, pp. 397-402.

** In addition to the fact that permitting such a remote party to recover damages involves a serious risk of duplicative recoveries, see *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), the evidence of this issue was so speculative that it would not justify an award of damages. While the district court admitted this testimony, it recognized the conjectural nature of this testimony by stating: "I suppose it would be as if the Philips' policy prohibited him from going to horse races or playing poker at conventions, and he lost a lot of profit thereby." (R. 1020a)

Lessig v. Tidewater Oil Company, 327 F.2d 459 (9th Cir. 1964) *cert. den.* 377 U.S. 993 (1964), is inappropriate in this case. *Hanover Shoe* involved a claim against a monopolist which insisted on leasing equipment rather than selling it. *Lessig* involved a claim that the plaintiff had been forced to pay more for branded TBA products than he would have paid had he been permitted to buy the same brand of products from another party. In the present case there is no monopoly and the plaintiff paid the same price for respondents' products as any other dealer would have paid.

Finally, petitioners have misstated this Court's opinion in *Times-Picayune v. United States*, 345 U.S. 594 at 606 (1953). In that opinion the Court did not state that "adverse competitive effect is presumed" in a section 3 Clayton Act case. Instead, the opinion pointed to *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922) as holding:

> "... that a seller occupying a 'dominant position' in the shoe machinery industry, without more, violated §3 of the Clayton Act by contracts tying to the lease of his machines the purchase of other types of machinery and incidental supplies." 345 U.S. at 606.

A review of the opinion of the Court of Appeals on the price fixing issues reveals that petitioners' reliance on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), has no justification. In the present case the Court of Appeals recognized that no lost sales had been shown during the four years prior to the filing of the complaint. It concluded that there had not been a showing of "sufficient evidence that Pitchford lost net profits because of PEI's pricing policies." (Opinion 11a) Thus the record in this case is different than the record in *Zenith*. In *Zenith* the district court had found that damages had occurred during the four years immediately prior to the filing of the complaint. The issue before this Court was whether all of those damages could be recovered

if some of them were as a result of overt acts committed prior to the four-year period of recovery permitted by the statute of limitations. In the present case, since no damages occurred during the four-year period covered by the statute of limitations, it is clear that no recovery can be had.

In its lengthy and exhaustive opinion the Court of Appeals expressly recognized that "the burden of proving fact of damage under §4 of the Clayton Act is satisfied by proof of some damage flowing from the unlawful conspiracy." Citing the earlier *Zenith Radio* opinion found at 395 U.S. 100 (1969) the Court of Appeals then went on to state:

> "It would have been sufficient if the wrongful acts had a tendency to injure Pitchford's business and if there had been introduced evidence of a decline in the value of Pitchford's profits that was not shown to be attributable to causes other than the antitrust violation." (Opinion 11a)

Clearly this standard of review gave petitioners liberal opportunity to show that they had introduced evidence to sustain a jury verdict.*

Since the Court of Appeals applied a standard of review which could not possibly have infringed upon the legal rights of the petitioners, it is clear that the real thrust of this petition is to ask this Court to undertake a *de novo* review of all of the evidence. This type of request presents no substantial federal question for the consideration of this Court.

Finally, that portion of the petition which is addressed to the action of the Court of Appeals in remanding for a

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* In the Petition for Writ of Certiorari filed at No. 75-1518 respondents have indicated that the Court of Appeals was too lenient in the standards which it imposed in determining whether any injury had occurred as a result of the alleged territorial market foreclosure.

determination of damage is not the type of issue which should be considered on certiorari. The Court of Appeals remanded for a new trial on damages for several reasons (see Opinion 31a, 35a-36a) only one of which involved a question as to the evidence of the sale of allegedly comparable business. Since other reasons exist for ordering a new trial on the issue of damages, there is no reason for granting review on the issue raised by the petitioners.

CONCLUSION

The policy of the Court is to grant writs of certiorari in cases involving principals of fundamental importance or where a conflict exists as to the law. Respondents submit that the present petition raises no important question as to federal law and involves no conflict of decisions requiring action by this Court. The Court of Appeals for the Third Circuit reviewed the factual record at trial against a liberal standard which favored the petitioners. This Court should not undertake a *de novo* review of the record under those circumstances. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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